



# Leadership Conference on Civil Rights

1629 K Street, NW  
10<sup>th</sup> Floor  
Washington, D.C. 20006  
Phone: (202) 466-3311  
Fax: (202) 466-3435  
www.civilrights.org

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May 28, 2004

Joseph DuBray, Jr.  
Director,  
Division of Policy, Planning and Program Development  
Department of Labor  
Office of Federal Contract Compliance Programs  
200 Constitution Avenue, NW Room C-3325  
Washington, D.C. 20210

## Re: Comments on Proposed Rulemaking Regarding Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes

Dear Mr. DuBray:

We, the undersigned members of the Leadership Conference on Civil Rights (LCCR) Employment Task Force, appreciate the opportunity to submit these comments in response to the proposed rulemaking regarding the Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes (OFCCP Proposal), published on March 29, 2004 in the Federal Register.

LCCR is a diverse coalition of more than 180 national organizations representing a broad constituency, including persons of color, women, children, labor unions, individuals with disabilities, older Americans, major religious groups, and gays and lesbians. As members of LCCR, we have a shared commitment to advancing equal opportunity in employment and in ensuring that all Americans are treated fairly in the workplace. We believe that the OFCCP Proposal raises several serious concerns and we strongly oppose its adoption. To do so would undermine critical employment law protections and create inconsistent rules and standards for job applicants. We believe such a result is unacceptable and unnecessary. Moreover, we question whether this additional guidance is needed in light of the Proposed Questions and Answers recently published for public comment by the four relevant agencies, including the Office of Federal Contract Compliance Programs (OFCCP), that address these very same issues. Putting forth, in effect, an alternative OFCCP Proposal is counter-productive and we urge you to withdraw it.

## I. Background:

**A. Context.** On March 4, 2004, the four agencies responsible for compliance with the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines or UGESP) published an interpretive guidance for public comment that sought to address questions regarding how the Uniform Guidelines apply to the internet and

Executive Director  
WADE J. HENDERSON

related technologies.<sup>1</sup> Specifically, the guidance proposed a series of Questions and Answers (Proposed Q&As) to clarify, among other things, what is meant by the term “applicant” in the context of the internet and the records employers must maintain when hiring through the internet. The OFCCP Proposal would implement this guidance by creating an additional special rule of interpretation for federal contractors regarding both internet applicants and the associated recordkeeping requirements. In evaluating the OFCCP Proposal, we believe that it is important to keep in mind the broader context for the Uniform Guidelines, as well as many other workplace rules and guidance. The Uniform Guidelines have been an important tool for ensuring that workplaces operate free of discrimination, and that individuals applying for a job are treated fairly during the hiring process. These guidelines and rules have been developed, in part, to remedy persistent discriminatory employment practices that disproportionately have shut minorities and women out of valuable job opportunities. Although they receive little public attention, we believe that the Uniform Guidelines in particular play a critical role in providing much-needed direction to federal contractors and employers, and ensuring that the selection procedures used to hire employees are fair, appropriate, and precise. They also ensure that contractors and employers keep accurate records about their hiring processes so that there is comprehensive information about who applied for a job and how different candidates were selected. As such, they provide a standard for good business practice that is essential and vital to maintaining fair, unbiased workplaces for employees and employers alike. Further, because they reflect the collective wisdom of the four key federal agencies responsible for enforcement of workplace laws, the Uniform Guidelines provide invaluable guidance to courts as they consider how the law should work.<sup>2</sup>

A particularly important feature of the Uniform Guidelines is that they require employers to keep records about applicants, including information on the race and gender composition of the applicant pool. In conjunction with these recordkeeping requirements, employers also are required to analyze the selection procedures used to whittle down the pool of applicants for a particular job to determine whether the procedures have had any adverse impact on a particular group of female and/or minority applicants. This type of analysis is critical to making sure that women and minorities are treated fairly during the hiring process. It also is a necessary part of ensuring compliance with the law and maintaining strong and vigorous civil rights enforcement. We believe that these recordkeeping requirements are particularly important for federal contractors who must maintain these types of records to comply with federal rules and also must produce such records for OFCCP compliance reviews.

**B. Key Principles:** With this broader context in mind, we believe there are several key principles that should frame any discussion about the OFCCP Proposal or other proposals addressing the same issues. First, it is critical to ensure that all applicants are treated fairly when applying for a job. Any proposal under consideration must be crafted to strengthen, and not

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<sup>1</sup> 69 FR 10152. The guidance was issued, jointly, by four agencies: Equal Employment Opportunity Commission (29 CFR Part 1607); Department of Labor, OFFCP (41 CFR Part 60-3); Department of Justice (28 CFR Part 50); Office of Personnel Management (5 CFR Part 300).

<sup>2</sup> See, e.g., *Bushey v. New York State Civil Service Comm'n*, 733 F.2d 220, 225-226 (CA2 1984), cert. denied, 469 U.S. 1117, 105 S.Ct. 803, 83 L.Ed.2d 795 (1985); *Firefighters Institute v. St. Louis*, 616 F.2d 350, 356-357 (CA8 1980), cert. denied sub nom. *St. Louis v. United States*, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981).

undermine, potential applicants' confidence in the overall hiring process. Second, it is important to make certain that individuals who legitimately believe that they have applied for a job are not excluded unfairly from consideration as applicants. Third, we must ensure that individuals who are similarly situated – e.g., individuals who apply for a job in the same way – are treated in the same manner, regardless of whether they utilized the internet in their job search or not. If individuals use the same strategy to apply for a job, it is unfair to exclude some of them from the applicant pool while including others who used the same approach in applying for the job, whether the application was submitted through the internet or not. Fourth, we must promote consistency in employer practices and minimize chances of arbitrary employer rules or procedures. Employers who are inconsistent in their practices and do not comply with their own rules can end up creating more confusion about the procedures potential applicants are expected to follow. Thus, it is crucial to focus any analysis on the employer's *actual* practice, rather than any procedures that the employer says it follows. Fifth, we need to preserve comprehensive recordkeeping by employers to ensure that the identity of all persons considered for a vacancy, whether formally or informally, is recorded. Finally, we must ensure that goals to expand the use of new technologies and to pursue vigorous enforcement are not pitted against each other; rather, these two goals should work together in a complementary fashion so that we can provide guidance to employers and other federal personnel who have enforcement responsibilities. We believe that these framing principles are a crucial part of evaluating the OFCCP Proposal, and helping to accomplish the overarching goal of ensuring that all job applicants are treated in a fair and even-handed manner.

## **II. Comments on OFCCP Proposal:**

As a threshold matter, we question why OFCCP would establish a special rule for federal contractors that is different from the rule outlined in the Proposed Q&As recently published by the four UGESP agencies. We believe that the creation of a new rule will foster confusion and, thus, is counter-productive. We also object to the substance of the OFCCP proposal because we believe it will make it harder for individuals to apply for jobs. While we have concerns about the Proposed Q&As, which we detailed our comments of May 3, 2004 and incorporate by reference here (*see attached*), the OFCCP Proposal actually exacerbates the problems we identified. In particular, we stressed the need for strengthening the language in the Proposed Q&As to promote consistency in employer rules, make sure that applicants who apply for a job in the same way are treated in the same manner, and ensure comprehensive recordkeeping of the applicant pool. Establishing a special rule for federal contractors simply adds a new layer of problems to the concerns we have identified, further complicating an issue that is already complex. The OFCCP Proposal arguably would facilitate employers excluding qualified job applicants from the applicant pool, and foster confusion among job candidates and employers by permitting different rules for internet and non-internet applicants. Thus, as we discuss below, we strongly object to the proposed rule set forth in the OFCCP Proposal because we believe, if adopted, it risks eroding hard-won legal protections for job applicants.

**A. Proposed Definition of “Internet Applicant” Risks Undermining Important Antidiscrimination Protections.** The OFCCP Proposal would amend OFCCP’s existing regulations to create a definition of an “Internet Applicant.” The proposed definition states:

*“(1) Internet applicant means any individual who:*

- (i) Submits an expression of interest in employment through the Internet or related electronic data technologies;*
- (ii) The employer considers the individual for employment in a particular open position;*
- (iii) The individual’s expression of interest indicates the individual possesses the advertised, basic qualifications for the position; and,*
- (iv) The individual does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual.” 69 FR 16446.*

For the following reasons, we believe that the proposed definition poses significant problems.

**(1) The requirement that internet applicants satisfy the “advertised, basic qualifications” for the job risks undermining important antidiscrimination protections.**

- *A minimum qualifications standard can be manipulated to exclude qualified candidates.* The proposed definition of internet applicant would require every applicant who applies for a job through the internet to possess the “advertised, basic qualifications.” We strongly oppose incorporating a “basic qualifications” standard into an internet applicant definition. We believe that such a standard can be used to impose arbitrary job criteria that exclude qualified individuals from being considered as an applicant for a job. Too often, potential job applicants have been screened out of jobs unfairly because they did not meet certain “qualifications,” even though the qualifications may not have been necessary for the job at issue. In the seminal *Griggs*<sup>3</sup> case, the Supreme Court made clear that an employer’s job qualifications must be job-related and consistent with business necessity, and that hiring criteria failing to meet that standard could be deemed unlawful. We believe that the term “internet applicant” should not be confined to individuals meeting certain “minimum” criteria, because such restrictions can be manipulated to exclude from consideration qualified individuals capable of performing a particular job. It can often be the case that an applicant has unique experiences, perhaps that the employer never contemplated, that are comparable to the stated job qualifications and could enable an individual to perform a particular job well. Moreover, we believe that when job criteria are developed for a particular job, they are best used for the purpose of determining who gets hired. In contrast, the OFCCP Proposal seeks to use such qualifications to decide who gets to apply. Such an approach is simply unfair to applicants who want to apply for a job.

- *The proposed definition is insufficient protection against unfair treatment of job applicants.* The proposed definition apparently seeks to address concerns about the minimum qualifications standard by including language explaining what is meant by the phrase “advertised, basic qualifications.” It states, in part:

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<sup>3</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-4 (1971).

*“(2) For purposes of this definition, “advertised, basic qualifications” means qualifications that the employer advertises . . . to potential applicants that they must possess in order to be considered for the position and that meet all of the following three conditions:*

- (i) The qualifications must be noncomparative features of a job seeker. . . .*
- (ii) The qualifications must be objective; they do not depend on the employer’s subjective judgment. . . .*
- (iii) The qualifications must be job-related; in other words, they are relevant to performance of the job at hand and enable the employer to accomplish business-related goals.” 69 FR 16446 at 16449-16450.*

For several reasons, this language does little to assuage our concerns. First, the definition does not address the fact that internet applicants will be required to satisfy the employer’s “advertised, basic qualifications,” while non-internet applicants will not have to adhere to the same requirement. As we have stated already, we believe that every applicant should have to follow the same rules. Creating a process that treats different applicants differently simply opens the doors to future problems and disputes. Having two different rules facilitates manipulation of the application process. Further, two different rules creates added legal complications – it incorrectly assumes that all applicants will fit neatly into one of two categories of applicants, those who apply through the internet and those who do not. But some applicants may choose to use both mechanisms, and in those cases, it would be unclear which rule should apply. Second, under this definition, employers may not be required to maintain records of all individuals who apply for a job if it is decided that an individual does not satisfy the stated qualifications. We believe that, even if a person is unqualified for a job, they should be deemed an applicant and recorded as such if they applied for the position. Their lack of qualifications just explains why it is appropriate not to hire that individual. We believe that an employer’s records must reflect the entire pool of job applicants, as well as documenting how that pool was narrowed to a smaller group of candidates. If a federal contractor is not required to maintain these applications, then there would be no record to review in case of a dispute about the criteria used for the job. Finally, we also are concerned about the actual language used in the definition, particularly the third component regarding the job-related nature of the stated qualifications. We believe that the Civil Rights Act of 1991 has two relevant requirements – that qualifications are (1) “job-related for the position in question” and (2) “consistent with business necessity.”<sup>4</sup> The language in the proposed definition, however, is not clear that these are two distinct points, and seems to suggest that the concept of job-relatedness incorporates the concept of business necessity. Further, the explanation of what is meant by “job-related” seems to understate what the law requires by suggesting that any “relevant” job criteria is sufficient to satisfy the legal standard. While we recognize that there are many different views on how best to define these concepts, we believe that this proposed definition is both confusing and inconsistent with our interpretation of the law.

**(2) The requirement that an employer actually must consider an individual for a particular job to be deemed an internet applicant risks excluding qualified job applicants from the hiring process.**

• *The OFCCP Proposal could lead to the exclusion of legitimate job applicants.* Under the OFCCP Proposal, an individual is an internet applicant only if, in part, the employer “considers

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<sup>4</sup> 42 U.S.C. 2000e-2(k)(1)(A)(i).

the individual for employment in a particular open position.” This requirement could be interpreted to mean that an individual is not an internet applicant until an employer actually decides to consider that person for a job. Under such an interpretation, qualified individuals who follow all the rules and apply for a job, nonetheless, could be excluded from consideration simply because the employer decided not to consider that person, for whatever reason. A misguided employer could decide that he/she only wanted to “consider” applicants with certain credentials, or from a particular community, regardless of their actual qualifications for a job. That result is wholly inconsistent with equal employment opportunity and fairness principles, and would open the door to arbitrary decisions about who should or should not be included in the applicant pool.

**(3) The requirement that internet applicants submit an expression of interest in the particular position can be accomplished in many different ways.**

- *The OFCCP Proposal should make clear that there are multiple ways for a potential applicant to submit an expression of interest in a particular position.* It is important first to recognize that an individual can “express an interest” in a particular position in many different ways. Determining whether an applicant has expressed an interest in a certain job depends, in part, on the hiring process the employer sets up, and whether the employer and the applicant have acted reasonably in following the procedures that have been put in place. If an individual visits an employer’s web-site and, in response to different prompts, e-mails a resume expressing an interest in certain types of positions, then in many instances that person would be considered to have expressed an interest in a job with the employer. That action may or may not also be enough to demonstrate an interest in a particular position, but that determination will depend on the instructions given to the potential applicant. If the person is told that the resume will be kept and considered as positions become available, then the person might reasonably believe that they have indicated an interest in a particular position. If the person is told that no positions are available and they should continue to check the web-site and apply as positions are posted, then the person is on notice that they have an affirmative responsibility to apply for positions as they are announced. We believe that any guidance that is developed should make clear that individuals who reasonably believe, based on the information they received from the employer, that they have applied for a particular position should be considered applicants for that position and recorded as such.

**B. The OFCCP Proposal Would Permit Different Standards for Non-Internet and Internet Applicants and Result in Unequal Treatment of Job Applicants.** The OFCCP Proposal contemplates that federal contractors would have rules for internet applicants that are different from the rules established for individuals not applying through the internet. We believe that such a construct creates several problems.

**(1) Any proposal regarding applicants should ensure that similarly situated applicants are treated in an equal manner.**

- *To be workable, the OFCCP Proposal must be designed to ensure that similarly situated applicants are treated in an equal manner.* We believe that when an employer considers

applicants for a particular position, everyone who followed the same procedures should be considered, whether or not they used the internet. Further, we believe that employers must treat similarly situated applicants in the same manner. Such consistency is important for several reasons. First, it obligates employers to handle applications fairly, helps to eliminate bias in the hiring process, and actually simplifies recordkeeping responsibilities. Second, it ensures that all applicants play by the same rules. Setting up a process that calls for one group of applicants to follow one set of rules and another group of applicants to follow a different set of rules simply creates confusion and unfairness. Applicants should not be treated differently solely because of how they choose to submit their application. To do so risks penalizing qualified applicants unfairly for reasons wholly unrelated to their ability to do a particular job.

To ensure that the records on applicants accurately reflect the actual hiring process, we believe that individuals who are similarly situated – i.e., those that apply for a job in the same way – should be treated in the same manner. This means that if an employer includes in the applicant pool individuals who handed their resumes to different employees in the department with the job opening, then the employer also must include internet applicants who e-mailed their resumes to that department, even if that is not the process that was laid out. In short, candidates who are similarly situated to those actually considered also must be deemed applicants. For example, a large manufacturing company requires internet applicants for an accounting position to complete a special form and e-mail it to the Human Resources Department. One-hundred internet applicants follow this procedure, but twenty-five internet applicants e-mail their resumes, instead, to personal contacts and ask them to forward the resumes directly to officials in the Accounting Department. The employer includes the one-hundred properly submitted applications in the selection pool and excludes the twenty-five applications improperly submitted. It would be inappropriate for the employer to consider any other non-internet applicants who did not follow these special form/e-mail procedures.

- *If an employer deviates from its hiring procedures, then individuals who did not follow those procedures but are similarly situated to those who were considered for the position should be considered as well.* If, in the example above, the employer deviates from the special application process by adding ten resumes into the selection pool that were handed to various senior officials and passed to the head of the Accounting Department, then the twenty-five internet applicants who sent their resumes to their company contacts also should be considered and recorded as applicants. In such a case, the twenty-five internet applicants would be similarly situated to the ten non-internet applicants who were added to the selection pool. It would be unfair to exclude some of these applicants from the hiring process and include others if they all applied in a similar fashion. The important point is that this requirement should be subject to the *actual* and *specific* practices used by the employer to hire for a particular position.

**III. Conclusion.** Because the Uniform Guidelines govern the selection procedures used for making employment decisions such as hiring, promotion, transfer, and other employment actions, any guidance issued by federal agencies must be carefully considered. As technology becomes more sophisticated, it becomes more important for our enforcement agencies to make appropriate adjustments, while also providing clear and effective standards that promote good business practices. We believe that the OFCCP Proposal, as currently crafted, is inconsistent



with our goal to ensure that all applicants are considered fairly and employers utilizing the internet and related technologies operate in a lawful manner. We urge you to reconsider moving forward with this proposal.

We appreciate the opportunity to submit these comments and look forward to working with OFCCP and other enforcement agencies to ensure that the Uniform Guidelines will continue to guide federal contractors, employers, and our courts in promoting fair employment practices and workplaces free of unlawful discrimination.

Sincerely,

Lawyers' Committee for Civil Rights Under Law  
Leadership Conference on Civil Rights  
Legal Momentum (the new name of NOW Legal Defense & Education Fund)  
NAACP  
National Asian Pacific American Legal Consortium  
National Partnership for Women & Families  
National Women's Law Center  
Women Employed